NO. 80-542

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1980

DIANNA SCHNEIDER

Petitioner

VS.

STATE OF ARKANSAS

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARKANSAS

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

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QUESTION PRESENTED FOR REVIEW

WHETHER IN STATE COURT REVOCATION OF PROBATION PROCEEDINGS IT IS PERMISSIBLE FOR THE STATE TO ADMIT EVIDENCE SEIZED PURSUANT TO A VALD SEARCH WARRANT (ALLEGED HERE TO BE INVALID) IN SUPPORT OF ITS PETITION TO REVOKE PROBATION.

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OPINION BELOW

The opinion of the Arkansas Supreme Court is found at 269 Ark. 245, 599 SW2d 730 (1980), and is reproduced in the appendix to the Petition for Writ of Certiorari at page A-1.

JURISDICTION

The petitioner relies upon 28 U.S.C. §1257(3) as the basis for this Court's jurisdiction. That section provides discretionary review by this Court, "where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution . . . of the United States." This Court has held that where the issue raised on certiorari has not been previously presented to, or decided by the State Supreme Court, the Court is without jurisdiction to review the issue on certiorari. *Raley v. Ohio,* 360 U.S. 423, 436 (1959); *Congress of Industrial Organizations v. McAdry,* 325 U.S. 472, 477 (1944).

In the present case, petitioner did not raise the alleged unconstitutionality of *Ark. Stat. Ann.* §41-1209(3)(b) (Repl. 1977) in her appeal to the Arkansas Supreme Court, raising rather the admissibility and sufficiency of evidence presented at her revocation hearing. Since the State Court resolved these issues against petitioner, it specifically stated that it did not address the issue raised herein. Since the State Court did not decide the issue raised here, jurisdiction for certiorari does not lie.

CONSTITUTIONAL PROVISIONS INVOLVED

The petitioner has adequately set forth the constitutional provisions involved.

STATEMENT OF THE CASE

On January 25, 1977, the petitioner pled nolo contendere to possession of heroin, amphetamines, and marijuana with the intent to deliver. She was sentenced to five years probation. On February 5, 1979, the State filed a petition to revoke petitioner's probation contending: that petitioner had committed the offense of possession of marijuana; that during her probation period petitioner had actively engaged in the selling of marijuana and other illicit drugs; and that she had committed the offense of felon in possession of a firearm.

At petitioner's revocation hearing, the State admitted evidence seized pursuant to a valid search warrant for the search of petitioner's house. The court hearing the revocation petition specifically upheld the validity of the search warrant. Petitioner appealed that finding alleging that the search warrant was in violation of a State procedural rule. She did not allege at that time that the search was conducted in violation of the *Fourth Amendment to the United States Constitution.* Nor did she challenge the constitutionality of *Ark. Stat. Ann.* §41-1209(3)(b) (Repl. 1977), which allows the admissibility of relevant evidence in probation revocation proceedings regardless of its admissibility in a criminal trial.

On appeal, the Arkansas Supreme Court found that the search warrant was valid and proper and therefore found it unnecessary to address the issue of the constitutionality of §41-1209(3)(b). In her pettion for certiorari, petitioner is asking this Court to review a decision not reached by the Arkansas Supreme Court.

REASONS FOR DENYING THE WRIT

Numerous reasons exist for this Court to refuse to review the issue raised in Dianna Schneider's petition. It is noted in *Rule* 17 *of the Rules of the Supreme Court* that a review on a writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. Rule 17(1) goes on to set out the general considerations governing review of state court decisions as follows:

> (b) when a state court of last resort *has decided* a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) when a state court . . . *has decided* an important question of federal law which has not been, but should be, settled by this Court, or *has decided* a federal question in a way in conflict with applicable decisions of this Court.

(Emphasis added.)

The *decision* which petitioner asks the Court to review is one which has not yet been made. The Arkansas Supreme Court specifically declined to address the constitutionality of §41-1209(3)(b) because the evidence admitted at petitioner's revocation hearing was legally seized pursuant to a valid search warrant. (See the Court's decision at pages A-9, A-10 of petitioner's brief.) The petitioner does not seriously contest this finding on admissibility of the evidence, but rather, merely tells the Court that "it will have no problem" circumventing the State's Court ruling on admissibility of the evidence, if the Court deems that

necessary to resolve the issue raised in his petition. (Her brief page 6) Although this contention may be correct, for practical purposes, it better shows the reasons why this Court should deny certiorari.

Special and important reasons require that certiorari be granted. *Fay v. Noia,* 372 U.S. 391 (1963). Special and important reasons are those which reach issues of constitutional dimensions, *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70 (1955), and which present a *real not a fictitious,* federal issue. *Quong Ham Wah Co. v. Industrial Acc. Commission,* 255 U.S. 445 (1921).

A probation revocation proceeding is administrative in nature. It is not an adversarial proceeding, being neither a civil action nor a criminal prosecution. *U.S. ex rel. Lombardino v. Heyd,* 318 F. Supp. 648, 652 (E.D. La. 1970), *aff'd,* 438 F.2d 1027 (5th Cir. 1970), *cert. denied,* 404 U.S. 880 (1971).

It has not been the practice of the Federal courts to concern themselves with areas which have traditionally been matters of State concern. *See, Morrissey v. Brewer,* 443 F.2d 942, *cert. denied,* 404 U.S. 999 (1971). Respondent submits that administrative procedures are matters of State concern and are not proper considerations of this Court.

Petitioner had previously been found guilty of a felony so the criminal prosecution was completed. *Frad v. Kelley,* 302 U.S. 312 (1937). Her guilty verdict is not at issue here, only the revocation of her probated sentence, an issue this Court has previously refused to entertain. *Lombardino, supra.*

If petitioner's petition is granted, she will be asking the Court to rule that the exclusionary rule is applicable to

probation revocation hearings. Federal courts have consistently refused to apply this judicially created rule to federal probation revocation proceedings. See, *Grogan v. United States*, 262 F.2d 78 (5th Cir. 1958); *United States v. Brown*, 488 F.2d 94 (5th Cir. 1973); *United States v. Farmer*, 512 F.2d 160 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975); *U.S. ex rel Lombardino v. Heyd*, 318 F. Supp. 648, *aff'd*, 438 F.2d 1027 (5th Cir. 1970), *cert. denied*, 404 U.S. 880; *United States v. Hill*, 447 F.2d 817 (7th Cir. 1971); *United States v. Winsett*, 518 F.2d 51 (9th Cir. 1975); *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975); *United States v. Wiygul*, 578 F.2d 577 (5th Cir. 1978).

These cases reason that since the avowed purpose of the exclusionary rule is to deter police misconduct, *Elkins v. United States*, 364 U.S. 206 (1960), the maximum deterrent purpose is achieved by excluding the evidence from the *criminal prosecution*. Any deterrent effect which might be achieved by excluding the evidence from probation revocation hearings would be minimum. See, *Harris v. New York*, 401 U.S. 222 (1971), where this Court said:

> Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution *in its case in chief*.

(Emphasis added) 401 U.S. at 225.

Since the exclusionary rule prevents the use of good reliable evidence, allowing the guilty to go free, minimum (if not non-existent) deterrence does not justify the exclusion of reliable evidence from the revocation proceeding.

The federal courts have balanced the potential benefits

of thus expanding the exclusionary rule against the potential injury to the functioning of probation revocation proceedings, and have found the injury to outweigh the benefits. Since the purpose of probation is to promote the rehabilitation of the criminal, allowing him to re-integrate into society, it is of utmost importance for the courts to be allowed to consider all reliable evidence to determine whether probation requirements are complied with. Failure to meet those conditions may indicate that the probationer is incapable of rehabilitation by integration.

This was the case in petitioner's case. Convicted for selling controlled substances, the State in its grace, placed her on probation hoping to accomplish rehabilitation. Petitioner capitalized on this misplaced leniency by continuing her illicit trade.

The federal courts have provided an exception to the general rule that illegally seized evidence is admissible at revocation hearings. If the evidence seized results from police harassment or intentional police misconduct aimed at creating a probation revocation, the evidence will not be admitted. See, *e.g.*, *United States v. Rushlow*, 385 F. Supp. 795 (D.C. Cal. 1974); *cert. denied*, 429 U.S. 984 (1976), *aff'd*, 541 F.2d 287 (1976).

Although certiorari may be granted on this issue in a proper case, this is not such a case. In the petitioner's case legally seized evidence was admitted rather than evidence seized in violation of the constitution. Here no bad faith or illegality on behalf of the law enforcement authorities is alleged or proven. Rather, the police concientiously sought to comply with the warrant requirement of the Fourth Amendment and the Supreme Court of Arkansas has found that the warrant was properly obtained and executed. This

is *not* a case when police authorities flaunted the Fourth Amendment's mandate, secure in the knowledge that the fruit of this action would nonetheless be admissible.

This Court has shown a disinclination to extend the impact of the exclusionary rule. *Stone v. Powell,* 428 U.S. 465 (1976); *United States v. Janis,* 428 U.S. 433 (1976); *United States v. Calandra,* 414 U.S. 338 (1974). This is not the type of case which will justify further expansion of the rule.

CONCLUSION

This Court should not grant certiorari to review an issue not first addressed to, or decided by the State Supreme Court. Petitioner should not be allowed to anticipate how the State Court *would* rule on the issue if properly raised and then argue that this hypothetical ruling is in conflict with established rulings of other states.

The scope of the exclusionary rule should not be expanded to include probation revocation. The facts of the instant case certainly do not justify such an expansion.

Respectfully submitted,

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